Supreme Court, U.S.
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No. 02-49

In The

Supreme Court of the United States

JONATHAN LEWIN,

Petitioner,

v.

WILLIAM J. COOKE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner Jonathan Lewin has a "due process" right to veto the choice of the United States Court of Appeals for the Fourth Circuit not to publish a *Per Curiam* Opinion merely because Lewin disagrees with that Opinion.

2. Whether the Medical College's Rule 54(b)(2) Motion for Attorneys' Fees was timely.

3. Whether the Court of Appeals abused its discretion in affirming an award of counsel fees in favor of the Medical College because Petitioner Lewin's lawsuit was frivolous, unreasonable and without foundation.

4. Whether the garden variety issues raised in the balance of Lewin's Petition consist of either allegedly erroneous factual findings or the purported misapplications of properly stated rules of law and therefore do not merit this Court's review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Jonathan Lewin's Petition correctly sets forth the parties and Rule 29.6 Statement. (Lewin Petition at iii).

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REASONS FOR DENYING THE WRIT

I. Petitioner Jonathan Lewin Has No "Due Process" Right To Veto The Choice Of The United States Court Of Appeals For The Fourth Circuit Not To Publish A *Per Curiam* Opinion Merely Because Lewin Disagrees With That Opinion

Without any due process analysis, Petitioner Lewin ("Lewin") baldly states that he has a "due process" right to veto a choice by the United State Court of Appeals for the Fourth Circuit not to publish a *per curium* Opinion because, in his view, that unpublished Opinion belongs to a "small subset" of "disobedient opinions." (Lewin Petition at 14-15). That Lewin feels that a particular Opinion should be published, regardless of the court of appeals' wishes, does not come close to providing any compelling reasons for this Court to grant this petition for a writ of certiorari. (Supreme Court Rule 10) ("A petition for a writ of certiorari will be granted only for compelling reasons."). Other than Lewin's self-serving characterization of the Opinion as "disobedient," and his personal preference for publication, no reasons, compelling or otherwise, warrant this Court's intervention.

Lewin invokes the Due Process Clause as "authority" for the coercive publication of this Opinion. (Lewin Petition at 6-15). Absent, however, is any argument demonstrating why the Due Process Clause gives him, or any other litigant, the constitutional right to veto a court of appeals decision not to publish a particular opinion.

The Due Process Clause of the Fourteenth Amendment has both a procedural and substantive component. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112

S.Ct. 1061, 1068, 117 L.Ed. 261 (1992). The procedural component provides a guarantee of fair procedure in connection with state deprivation of life, liberty or property. The substantive component protects individual liberty against certain governmental actions regardless of the fairness of the procedures used to implement them. It is unclear from Lewin's Petition whether he is relying upon the Due Process Clause's procedural or substantive component (or both). In any event, it does not matter.

Neither the text nor the history of the Due Process Clause supports Lewin's bare assertion that he has a due process right to a published Opinion when, in his personal view, that Opinion is "disobedient." *Cf. Collins*, 503 U.S. at 126, 112 S.Ct. at 1069 ("neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause").

On the substantive side, the Due Process Clause was intended to prevent the state from abusing its power or employing its power as an instrument of oppression. (*Id.*). Due process guarantees, historically, have been applied to deliberate decisions of state officials to deprive a person of life, liberty or property. *Id.*, 503 U.S. at 127 n.10, 112 S.Ct. at 1069 n.10 (cases collected). The court of appeals' refusal to accede to Lewin's demand that it publish a *per curiam* Opinion is not even close to conscience shocking. *Id.*, 503 U.S. at 128, 112 S.Ct. at 1070 ("we also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in any constitutional sense").

On the procedural side, Lewin does not assert that because of economic or non-economic barriers he was denied meaningful access to the courts. *Cf. Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (where an appeal of a criminal conviction was conditioned upon the defendants' obtaining a trial transcript, the defendants could not be denied an appeal because of their inability to purchase the trial transcript); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) (Court struck down filing fees for divorce court because such fees denied indigents access to the court).

Nor is this a case where the court of appeals' unpublished Opinion treated as precedent, relied upon or cited to other unpublished Opinions. [App. 1a-16a]. In fact, the Opinion states, right under the names of counsel of record, that "[u]npublished opinions are not binding precedent in this circuit." *See* Fourth Circuit Local Rule 36(c). [App. 3a & 28a]. This is not, then, a situation where a litigant was disadvantaged because he or she was unable to marshall all the controlling law on point, because of the non-publication rule, and therefore was deprived of his or her due process right to a fair hearing.

The court of appeals, moreover, has set forth publication criteria for its opinions:

> Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:
>
> i. It establishes, alters, modifies, collects or explains a rule of law within this Circuit; or
>
> ii. It involves a legal issue of continuing public interest; or

> iii. It criticizes existing law; or
>
> iv. It contains an historical review of a legal rule that is not duplicative; or
>
> v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.
>
> The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or majority of the joining judges believes the opinion satisfies one or more of the standards for publications, and all members of the Court have acknowledged in writing their receipt of the proposed Opinion. A judge may file a published Opinion without obtaining all acknowledgments only if the Opinion has been in circulation for ten days.

(Fourth Circuit Local Rule 36(a)) ("Publication of Decisions").

Lewin, in effect, seeks to add a sixth publication criterion: namely, when an unhappy litigant feels that an opinion is "disobedient" then that opinion must be published regardless of whether the opinion's author or the majority of the joining judges believe that the opinion satisfies one or more of the other substantive standards for publication. This Court should not foist an "unhappy litigant" publication criterion upon the courts of appeals.

II. The Medical College's Rule 54(d)(2) Motion For Attorneys' Fees Was Timely

Lewin also has set forth no "compelling reasons" as to why this Court should review this case specific

"timeliness" question. (Lewin Petition at 18-19). The lone Decision that Lewin cites, *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 108 S.Ct. 717, 100 L.Ed. 2d 178 (1988), did not address the Rule 54(d)(2)(B) timeliness issue. Nor has Lewin pointed to any inter-circuit conflict. (Supreme Court Rule 10(a)). By raising this pedestrian question, Lewin treats this Court as some "Super Court of Appeals," and not as our "Supreme" Court. Nevertheless, the Medical College will address briefly this mundane question.

The Medical College's Rule 54(d)(2) Motion for Attorneys' fees was timely. Fed. R. Civ. P. 54(d)(2). On June 11, 2000, the Medical College filed its Rule 54(d)(2) Motion on the 14th day after the district court entered its "Opinion and Final Order" and "Judgment" denying Lewin's Rule 60(b) Motion for Reconsideration and fixing Rule 11 sanctions in the amount of $5,000.00. The district court, in an earlier Order entered May 1, 2000, had granted the Medical College's Motion to Dismiss but did not quantify sanctions. After the parties provided supplemental financial information, the district court, on June 27, 2002, fixed the amount of sanctions at $5,000.00 and denied Lewin's Rule 60(b) Motion.

Lewin's argument ignores the meaning of the term "judgment" as used in Rule 54. Rule 54's text is clear: The rule requires that motions for attorneys' fees "be filed and served no later than 14 days after entry of judgment." Rule 54 further defines "judgment," as "a decree and **any** order from which an appeal lies." Fed. R. Civ. P. 54(a) (bold type added). As the court of appeals observed, the word "any" is "all-inclusive in nature." *United States of America v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989). The court of appeals also defined the word "any" as a term of "great breadth" – with "expansive

meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

The district court's June 27, 2000 "Judgment" denying Lewin's Motion for Reconsideration and fixing Rule 11 sanctions in the amount of $5,000.00 is an Order from which an appeal would lie. In fact, Lewin, on July 11, 2000, appealed that Order to the court of appeals.

In short, **any** final, appealable judgment operates to restart the 14-day period for a motion for attorneys' fees. In *Weyant v. Okst*, 198 F.3d 311 (2d Cir. 1999) the Second Circuit held that timely post-judgment motions which seek to alter or reverse a judgment, such as Lewin's Rule 60(b) Motion, automatically suspend the judgment's finality. *Id.* at 314. The *Weyant* Court held that a Motion for attorneys' fees is timely if filed within 14 days of the resolution of such post-judgment motions. *Id.* at 315. On this "timeliness" issue, the Second and Fourth Circuits got it right, and Lewin gets it wrong.

The district court's May 1, 2000 Order, which requested an estimation of the Medical College's attorneys' fees, preserved the issue of the Medical College's attorneys' fees until the final Order of June 27, 2000, which quantified sanctions. It was only then that the Medical College had "good reason to believe that the district court would treat attorneys' fees as part of Rule 11 sanctions." [App. 14a]. As the court of appeals in the proper exercise of its discretion concluded,

> [u]nder these circumstances, it was reasonable for the defendants to wait until the district court had ruled on whether sanctions would include attorneys' fees before making their own motion for fees. Because the question of attorneys' fees was

> essentially held in abeyance by the May 1, 2000, order until the June 27, 2000, order, the later order constitutes a final judgment for the purposes of Rule 54(d)(2)(B)'s 14-day filing requirement.

[App. 14a-15a].

The court of appeals' real world, common sense reading of Rule 54(d)(2)(B) did not ignore the "plain meaning of Rule 11." (Lewin Petition at 19-21). It was sensible for the Medical College to file its Rule 54(d)(2) Motion within 14 days of the district court's June 27, 2000 Order, which, for the first time, quantified the amount of Rule 11 sanctions. If the district court, in its June 27, 2000 Order, had fixed sanctions in an amount equal to a "fair estimate" of reasonable attorneys' fees and costs, the Medical College would have had no reason to file its Rule 54(d)(2) Motion. Without knowing the amount of sanctions that the district court was going to impose under Rule 11, the Medical College had no way of determining whether a Rule 54(d)(2) Motion would have been necessary. In addition, a Rule 54(d)(2) Motion would have been rendered unnecessary had the district court granted Lewin's Rule 60(b) Motion for Reconsideration.

This was careful, prudent litigation conduct that sought to conserve both judicial resources and the Medical College's resources. No review is necessary of the timeliness issue on this record.

III. The Court Of Appeals Did Not Abuse Its Discretion In Affirming An Award Of Counsel Fees In Favor Of The Medical College Because Petitioner Lewin's Lawsuit Was Frivolous, Unreasonable And Without Foundation

The court of appeals held that the district court did not abuse its discretion when, under 42 U.S.C. § 1988, it awarded the Medical College attorneys' fees because Lewin's "civil rights" case was frivolous, unreasonable and groundless. [App. 15a].

Lewin, again treating this Court as some kind of "Super Court of Appeals," argues that the court of appeals should not have affirmed the fee award because the "nominal" damages question was one of "first impression" in the Fourth Circuit. (Lewin Petition at 22). This contention seriously understates the breadth of grounds for the fee award.

Lewin is unable to see the forest for the trees. The Court of Appeals affirmed the district court's decision to award the Medical College attorneys' fees on the following broad grounds:

> The district court found that Lewin's lawsuit was brought solely for the purpose of harassment, was asserted in bad faith, and constituted an attempt to relitigate matters already adjudicated. These findings are clearly supported by the record, and the district court did not abuse its discretion in awarding attorneys' fees for both Lewin's federal and state claims.

[App. 15a]. The unremitting litigation warfare that Lewin waged against the Medical College over many years and in many courts, with a singleness of purpose that bordered

on the obsessive, was in large part the basis for the fee award. Lewin conveniently ignores the large role his "litigation recidivism" played in the decision to award sanctions.

Lewin's Petition neither challenges the ample grounds of these conclusions nor addresses why this Court should exercise its discretion and review these grounds. Lewin, for almost a decade, treated litigation and courts as his personal playground, and has now paid the price. No compelling reasons exist for this Court to rescue this chronic vengeful litigant from the financial consequences of his litigation follies.

IV. The "Garden Variety" Issues Raised In The Balance Of Lewin's Petition Consist Of Either Allegedly Erroneous Factual Findings Or The Purported Misapplications Of Properly Stated Rules Of Law And, Therefore, Do Not Merit This Court's Review

The remaining garden variety issues raised in Lewin's Petition – qualified immunity, the "Master Challenge Exam," claim preclusion precedent and the frivolous motion to recuse Judge Smith – do not warrant this Court's review. (Lewin Petition at 22-29). Lewin gives absolutely no "compelling reasons," other than personal unhappiness with the outcomes, as to why any of these raise compelling questions of law that warrant this Court's extraordinary review. This nitpicking falls far short of the inter-circuit conflict or important federal questions, which are required for this Court's review. (Supreme Court Rule 10). Although the court of appeals correctly applied appropriate rules of law, here, a petition for a writ of certiorari is rarely granted when, as here, all that a petitioner

asserts is that the court of appeals misapplied properly stated rules of law.

At bottom, the court of appeals and the district court did not, based on Lewin's 10-year litigation campaign against the Medical College, abuse their discretion in awarding sanctions. As the court of appeals observed:

> The district court found that Lewin's lawsuit was brought solely for the purpose of harassment, was asserted in bad faith, and constituted an attempt to relitigate matters already adjudicated. These findings are clearly supported by the record, and the district court did not abuse its discretion in awarding attorneys' fees for both federal and state claims.

[App. 15a]. Lewin must now reap what he has, over these many years, sown.

This Court should not review the sanctions awards. The court of appeals affirmance of the district court's sanctions awards against this vengeful, chronic, recidivist litigator should stand.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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